No. 87-6177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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Respondent's Brief starts off with a rather extensive recitation of the facts of the case of which about half is devoted to facts that have little to do with the issues involved but only serve to emphasize that Penry committed a brutal crime. The issue in this case is not the brutality of the crime, but whether because of Penry's retardation and child abuse, he deserves less than the maximum punishment and whether or not the three Texas Special Issues adequately allow the jury to consider these mitigating factors in answering the life or death questions.

THE THREE SPECIAL ISSUES ARE INADEQUATE FOR THE JURY TO FULLY CONSIDER PENRY'S MITIGATING EVIDENCE

The State argues that Penry was able to introduce all the mitigating evidence he wished. Brief of Respondent at 18. This is true but given the present state of the law in Texas how much mitigating evidence that cuts both ways will he want to introduce? Penry did introduce ample evidence of his mental retardation and abused childhood. Opinions of the Texas Court of Criminal Appeals have consistently held that the only instructions the jury will receive on the Special Issues is that the issues will be answered in accordance with the evidence presented in both phases of the trial. Brief of Petitioner at 24-31. This clearly has a chilling effect on introduction of evidence that cuts both ways because the State can, does and did argue, with approval of the Texas Court of Criminal Appeals, that only the evidence relevant to the issues themselves can be considered. Brief of Petitioner at 24.

The State argues only the States are authorized to determine what factors may be considered by the jury in reaching the life or death decision. Brief of Respondent at

19. The *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978) line of cases has consistently rejected this argument holding that the sentencer must at least be able to consider any evidence offered in mitigation of punishment.

The State argues that "mercy" has no place in the constitutional scheme of capital cases (Brief of Respondent at 30.) and to allow it to have a place will be a return to the situation that existed prior to the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). This argument is entirely without merit. In the first place, it assumes that in *Furman* five Justices clearly stated what was wrong with the statutes in existence at that time. All that five justices of this Court could agree on was that, ". . . carrying out the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *id.* at 239-240. The four dissenting justices agreed that judicial restraint should have been exercised but otherwise there was a wide variety of opinions. *supra*.

In *Woodson* v. *North Carolina*, the plurality held that, "A process that accords no significance to relevant factors of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." 428 U.S. 280, 304 (1976). In *Lockett* v. *Ohio*, Chief Justice Burger writing for the plurality stated, ". . . the Eighth and Fourteenth Amendment requires that the sentencer. . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character. . . that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) In *Eddings* v.

Oklahoma, Justice Powell writing for the plurality stated, ". . . a consistency produced by ignoring individual differences is a false consistence." 455 U.S. 104, 112 (1982). In *Skipper* v. *South Carolina* Justice White writing for the Court held the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. 476 U.S. 1, (1986). In *Hitchcock* v. *Dugger*, Justice Scalia writing for the Court concluded the sentencer must not refuse to consider any non statutory mitigating evidence. ___ U.S. ___, 107 S.Ct. 1821, 1824 (1987)

The State argues that a jury instruction that the jury should answer one of the statutory questions "no" if they believed Penry should not get the death penalty would require that *Jurek* be overruled. Brief of Respondent, at 37. This assumes that this Court in *Jurek* v. *Texas*, gave its unqualified approval to the Texas Capital punishment scheme. This Court made it clear that its approval was based on the Court of Criminal Appeals assurance that definitions of the terms in the Special Issues would be forthcoming and that these definitions would allow all mitigating evidence to be considered. 428 U.S. 262, 272-3 (1976) Similarly, when this Court gave its approval to the Florida capital punishment statue in *Proffitt* v. *Florida*, 428 U.S. 242, 253 (1976), it found that on its face the eight statutory aggravating factors versus the seven statutory mitigating factors were adequate to satisfy *Furman*. However, this Court did not hesitate to reverse a Florida conviction when it was apparent that this statute failed to provide for consideration of non-statutory mitigating factos. *Hitchcock* v. *Dugger* ___ U.S. ___, 107 S.Ct. 1821 (1987)

The *Woodson—Lockett—Eddings—Hitchcock* line of cases hold that for a sentencer to refuse to or be prevented

from considering all mitigating evidence before assessing the penalty of death is cruel and unusual punishment. The State seems to think that the fact that just one hold out juror answering one question "no" can result in a life sentence somehow cures all defects in the Special Issues. However, the jury is charged that "it may not answer any issue 'no' unless 10 more more jurors agree." Art. 37.071 (d)(2) Texas Code Criminal Procedure. They are never told the effect of one juror holding out on one issue.

The State argues that, "The jury was free to consider whether Penry's mental retardation rendered him incapable if acting deliberately." (Brief of Respondent at 23) that, "Evidence of abused childhood also was relevant to whether his conduct was deliberate." (*id.* at 24) and, ". . . any conceivable mitigating evidence is relevant to at least one of the special issues, . . ." *id.* at 31. In the statement taken by Ranger Cook and introduced into evidence, Penry admitted that prior to the rape, he knew that he would have to kill her or she would tell the police (XV R. 2024 1. 1-5), that during the rape he decided to kill her using the scissors she had stabbed him with (XV R. 2027 1. 23-2028 1. 1) and that prior to stabbing the victim he told her he hated to kill her but if he did not kill her she would squeal on him. XV R. 2028 1. 5-7. Webster's Third New International Dictionary of the English Language, Unabridged defines deliberate as, "(1) characterized by or resulting from unhurried, careful, thorough and cool calculation and consideration of effect and consequences, (2) characterized by presumed or real awareness of the implications or consequences of one's actions or sayings or by fully conscious often willful intent, (3) slow, unhurried and steady as though allowing time for decision on each individual action involved." Given the fact that the statement taken by Ranger Cook was read to the jury and

entered into evidence (XV R. 2021 1. 16-25) there is little chance of convincing the jury that Penry did not have the mental capacity to act deliberately. What was the jury to do if they believed beyond a reasonable doubt that Penry was capable of acting deliberately but also believed he should not be executed? Had the assurance the Court of Criminal Appeals gave in *Jurek* been fulfilled and "deliberate" defined so that the jury was informed that for purposes of the First Special Issue a person acts deliberately only if that person's ability to conform his acts to society's requirements have not been significantly reduced due to mental defect or societal factors beyond the person's control, then the First Special Issue could have allowed consideration of Penry's mitigating evidence. Penry was not free in jury argument to argue any definition of deliberate he wished as the State argues. Brief of Respondent at 36. The District Attorney would have, under state law, been able to object that the definition argued was a misstatement of the law since the Court of Criminal Appeals has repeatedly held "deliberate" has its common meaning until such time as the Texas legislature gives it a special meaning. *Lane* v. *State* 743 S.W.2d 617, 628 n.7 (Tex.Cr.App. 1987).

The State concludes its argument in support of the three Special Issues by making the statement that to charge the jury that they are to vote "no" on one of the Special Issues if they believed Penry should not receive the death penalty would require *Jurek* to be overruled. This assumes that *Jurek* was actually found constitutional on its face. *Jurek* was found constitutional because of the assurance given by the Texas Court of Criminal Appeals that terms in the Special Issues would be defined so as to accommodate all mitigating evidence. 428 U.S. at 272. This Court made it clear than the constitutionality of the

Texas death penalty statute, ". . . turns on whether the enumerated questions allow consideration of particularized mitigating factors." *id.* Thus this Court only found the Texas death penalty statute was constitutional as the Texas Court of Criminal Appeals indicated it was intending to apply it.

The three Special Issues, without proper jury instructions, are inadequate to accommodate jury consideration of Penry's mitigating evidence. Penry was harmed by the failure of the trial court to give the requested jury instructions.

THE MENTALLY RETARDED SHOULD NOT BE EXECUTED

The State argues that because there is only one state that presently forbids the execution of the retarded (Brief of Respondent at 40) and there are methodological flaws in the two polls cited in Petitioner's Brief (Brief of Respondent at 41) there is no national consensus that a mentally retarded person should not be executed. The State appears to be arguing that hypothetically the facts can be made bad enough that a majority of those polled would support the execution of the retarded and that unless the question asked included a brutal fact situation the poll is flawed.

The State does not point out any state legislatures where the issue of executing the retarded was put to a vote and failed to pass. Such a Bill has now been introduced in Texas by State Representative Bob Melton. *73% in Texas Poll oppose executing retarded inmates*, Austin American Statesman, November 15, 1988 at B-3. This same article gives the results of a public opinion poll done by the Public Policy Resources Laboratory of Texas A&M University for Harte-Hanks Communications, Inc. When

asked, "Do you think that Texas should have capital punishment?" 86% answered yes. When asked "Should capital punishment be used in cases where the guilty person is mentally retarded?" 73% answered no. The poll had a 5% margin of error. Both questions were asked with no facts given as to the details of the crime and the question on execution of the mentally retarded followed the question on having capital punishment. The results of the poll were very similar to the results obtained in Georgia and Florida polls. J.A. 279, 283.

The State argues that to find that execution of the mentally retarded is cruel and unusual punishment would be to relegate the administration of justice to mental health professionals. Brief of Respondent at 44-49. In making their argument the State tries to equate mental retardation with insanity. The two are not the same. There are reasonably precise tests that measure the degree of retardation and in addition mental retardation will be apparent from an early age or else can be traced to an accident that damaged the brain. See *Classification in Mental Retardation, 1983 Revision*, (Grossman, M.D., Ed.) at 59-77.

Now that the issue of execution of the mentally retarded has been brought to the attention of the public it is becoming clear that the national consensus is that the mentally retarded should not be executed.

Respectfully submitted,

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